THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESTATE OF ROBERT FELTS, etc. Plaintiffs, v. GENWORTH LIFE INSURANCE COMPANIES, etc, et al, Defendants.	Case No. 06-1419-RAJ **DEFENDANT HERSH L. STERN'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION** Noted on Motion Calendar : September 12, 2008 ORAL ARGUMENT REQUESTED

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1. Introduction.

The transactions of which the plaintiff Estate of Robert S. Felts (the "Estate") complains were the product of an idea conceived and executed by Mr. Felts alone with no input or inducement from defendant Hersh Stern, who merely provided Mr. Felts with rate quotations and market access. There are no facts to indicate that Mr. Felts was deceived or somehow did not understand the transactions; to the contrary, the evidence is overwhelming that Mr. Felts knew exactly what annuity products he wished to purchase, understood their features and proceeded with the purchases with full knowledge. Thus, it cannot be said that Stern was unjustly enriched or that the consideration received by Mr. Felts was so inadequate as to be constructively fraudulent (1st claim for relief) or that Mr. Felts suffered from any unilateral mistake of fact of which Stern was aware to justify rescission (2nd claim). As a matter of law, Stern owed Mr. Felts no duty to conduct a suitability review (3rd claim), owed no duty of disclosure and otherwise made no fraudulent or negligent misrepresentations or omissions of material facts (4th claim). There is no evidence that Stern violated any provision of the Washington insurance code (5th claim), engaged in any deceptive acts which led to the Estate's damage and violated the consumer protection act (6th claim) or committed criminal profiteering (7th claim for relief). Given the above, there are no grounds for the Estate to seek the remedy of injunctive relief (8th claim). Defendants Hersh Stern and ImmediateAnnuities.com (collectively "Stern") are entitled to summary judgment on each claim for relief in the third amended complaint (the "Complaint") because under the undisputed facts of this case, Stern is entitled to judgment as a matter of law.

In the event that the Court finds that summary judgment on the entire Complaint is not appropriate, Stern requests that the Court order summary adjudication of each claim for which it finds that the material facts are not in dispute and Stern is entitled to judgment as a matter of law.

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2. __Statement of Facts__.[1]

A. Defendant Hersh Stern.

Stern represents a number of insurers who offer single premium immediate annuities ("SPIAs"), including defendant Genworth Life Insurance Company ("Genworth"). (Stern Dec. No. 8.)[2] Stern's main business activities are to provide a comparison shopping service for annuities on the internet and to publish, since 1986, a semi-annual newsletter called the Annuity Shopper (fka The Annuity & Life Insurance Shopper). (*Id.*) He owns the web address "www.immediateannuities.com" and conducts his business on the internet, by mail and phone.[3] (*Id.*) Other than listing his service with Google and Yahoo, Stern does not advertise his services in any way and depends largely on word of mouth and unpaid mention in various financial magazines to inform prospective customers about his service. (Stern Dec. No. 10.)

Through Stern's website and publication, consumers and insurance professionals can obtain pricing information for a variety of fixed annuity products issued by a number of insurers whom Stern represents. (Stern Decl. No. 10.) During the time at issue in this proceeding, the website and Annuity Shopper also contained life expectancy tables published by the Department of Treasury as well as the Annuity 2000 table adopted by many different state regulatory

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[1]In a quest for brevity, Stern and Genworth have coordinated their briefs for this motion and Stern will endeavor here to only address facts and evidence unique to his position or otherwise not addressed in Genworth's brief. Accordingly, Stern incorporates Genworth's Motion for Summary Judgment and supporting evidence, filed on this same date, by reference.

[2]In a further effort to reduce the burden on the Court's file and eliminate redundant evidence, Stern will use his best efforts to rely on evidence already before the Court in the context of the Estate's motion for class certification. Accordingly, references to the Stern Declaration and exhibits shall mean the Declaration of Hersh Stern In Support Of Opposition To Motion To Certify Class filed in this action on January 22, 2008. References to the concurrently filed Supplemental Declaration of Hersh Stern and exhibits will be so noted.

[3]Despite Immediateannuities.com being named as a defendant, it is merely a web-address and is not a business entity of any type.

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agencies. (Stern Decl. No. 10; Exhs. C and D.) The Annuity Shopper publication (along with its mortality tables) is, and at the relevant times was, sent to each prospective customer along with requested quotes and was sent to every past Stern customer, including Mr. Felts, as a matter of course and practice. (Stern Depo., pp.120:19–121:22, 122:6-14.)[4]

Stern is not a financial planner, does not represent himself as a financial planner and does not provide any financial planning services. (Stern Decl. No. 9.) He does not recommend one type of financial product or insurer over another, does not recommend particular products to fill particular needs, and does not discuss investment strategies with customers and prospective customers. (*Id.*) To the contrary, his service simply provides consumers and insurance professionals access to pricing information for and market access to the consumer/professional selected products of the many insurers Stern represents. (*Id.*)

Consistent with this practice, Stern never solicited Mr. Felts to make any annuity purchase. (Supp. Stern Decl. No. 2.) Stern never offered Mr. Felts any advice or recommendations regarding his annuity purchasing strategy or the insurers from whom to purchase annuities (*Id.*) In fact, Stern never provided other advice or recommendations of any sort regarding Mr. Felts' purchases. (*Id.*) Stern simply provided Mr. Felts with annuity pricing information for the products Mr. Felts himself selected and then provided market access for Mr. Felts to make purchases once he decided for himself that he wished to do so. (*Id.*)

B. Robert S. Felts.

In life, Mr. Felts was a career insurance salesman who, even into his 90's, represented himself as an insurance industry insider, a licensed insurance agent, retirement planner, "lifetime member of the Million Dollar Roundtable" (an organization of elite insurance producers compromising less than 5% of the insurance producers worldwide), and a representative of

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[4]The transcript of Stern's deposition was filed as Exhibit C to the Declaration of Steven A. Stolle in Support of Plaintiff's Motion to Certify Class, filed in this proceeding on December 26, 2007.

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"Sunshine Financial Services" and "Sunshine Insurance Services."[5] (Stern Decl. No. 19, Exh. H.)

Over the years from 1969 until his death in 2004, Mr. Felts purchased at least 126 single premium immediate annuities ("SPIAs"), including Term Certain, Life Only, Life with Period Certain, Joint with Survivor Benefits and Life with Refund Option. (Stern Dec. No. 21; Exh. J.)[6] Included in this number were at least 27 Life Only annuities issued after Mr. Felts reached the age of 85, the age at which point the Estate contends that Mr. Felts needed heightened protection. (*Id.*) Of these many annuities, 67 were purchased through Stern. (*Id.*)

In making his annuity purchases, Mr. Felts unquestionably employed his extensive knowledge of the insurance industry in general and annuity purchases in particular, performing for himself many of the functions ordinarily fulfilled by an agent. (Stern Decl. No. 22.) Mr. Felts often would contact insurance companies on his own in order to directly solicit quotes and applications. (*Id.*) Mr. Felts completed applications at home on his typewriter, contacted annuity underwriting and issue departments directly to change the amount of premium sent under earlier applications and to follow up on applications which he had sent directly to the issuer. (*Id.*) He occasionally requested Stern to provide him with pre-signed, blank forms so that he could transact business with the insurance companies directly, independent of Stern's office. (*Id.*)

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[5]Based on his represented status as a licensed agent, Mr. Felts asked Stern to pay him the customary 3% writing agent's commission on his own transactions. (Stern Decl. No. 22.) As a professional courtesy to a fellow insurance agent, Stern agreed, foregoing three-fourths of the 4% commission he would otherwise receive on Mr. Felts' annuity purchases. (*Id.*) The documents produced by the Estate confirm that Mr. Felts had similar discussions with the other agents with whom he worked. (Supp. Hinton Decl. No. 2, Exh. P.)

[6] In fact, the evidence produced by the Estate seems to indicate that Mr. Felts may have purchased as many as 131 annuities or more over the course of his life. (Exh. J)

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Mr. Felts felt completely comfortable and confident in making his own financial decisions and eschewed advice from those financial planners and agents who offered it to him. In one of several examples of this disposition, Mr. Felts explained in a August 2, 2003 letter to Genworth:

> …once or twice I've just bought from a co. direct because I don't want any agent to tell me what I need altho [sic] it is always good to hear their opinions if only ½ my age at 94 yrs.

(Stern Dec. No. 19; Exh. N.) Indeed, Mr. Felts' daughter and personal representative Susan Charles testified her father was not prone to taking advice in financial affairs, explaining that " . . . he thought he knew it, everything he needed to know to make decisions, financial decisions." (Charles Depo., 74:15-17, 148:25-149:2.)[7] This is consistent with Stern's experience with Mr. Felts, who never sought Stern's guidance or advice in his annuity purchasing decisions and in fact rebuffed Stern whenever their conversations touched on Mr. Felts' financial condition or needs. (Stern Decl. No. 24.)

Mr. Felts had other commercial endeavors in his later years in addition to purchasing annuities. In a letter Mr. Felts wrote to his children in November, 2003 he explained that since Ms. Felts death in 2002, he was "free to 'run rabbit run' in commercial projects darling Jenny never wanted to approve." Mr. Felts explained that one month after Mrs. Felts death, he had mortgaged the property to purchase more annuities ". . . because of a 20 to 25% Hi return at my advanced senior age of 92 years."[8] (Supp. Hinton Decl. No. 3; Supp. Exh. Q.) Mr. Felts further explained that he was using the proceeds of the annuities to purchase the mobile home trust deeds for himself *and for them*, claiming to receive 24% return per year on the notes. (*Id.*) Mrs.

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[7]The transcript of Stern's deposition was filed as Exhibit C to the Declaration of Darcy Shearer in Opposition to Plaintiff's Motion for Class Certification, filed in this proceeding on January 22, 2008.

[8]Stern was not aware of the mortgage loan or the trust deed investments until after Mr. Felts' death. (Stern Dec. No. 28.)

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Charles testified that she had seen this letter prior to Mr. Felts' death and yet did nothing to deter any of her father's investment activity. (Charles Depo., 143:19-144:24.)

C. The Disputed Transactions.

Upon Mrs. Felts' death in early 2002, Mr. Felts lost the income he was accustomed to receiving from the annuities based on her life and from those which they jointly owned, many of which reduced to 50% or 67% of their original levels upon the death of the first annuitant. (Stern Dec. No. 27.) Accordingly, he determined to replace that income through additional SPIA purchases, several for his life alone without refund to beneficiaries in order to maximize the income he received for the premium he paid. (*Id.*) With the exception of the one Life Only SPIA purchased in 2001, these purchases include those of which the Estate now complains.[9]

At or about this same time, in spring 2002, Mr. Felts refinanced his home as referenced in November 2003 letter, extracting some $181,000 equity as cash. (Comp., ¶ 2.18.) Claiming that the loan was made to fund annuity purchases and attempting to characterize this as evidence of over-reaching by defendants, the Estate alleges that defendants either persuaded Mr. Felts to take out the loan to fund annuity purchases or knew of the loan and failed to advise Mr. Felts that such a financing scheme was unsuitable. (*Id.*) Setting aside any dispute regarding the suitability of using home equity funds to purchase annuities, the facts show that, contrary to the Estate's overblown allegations, Stern had no knowledge of this loan.[10]

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[9]In addition to the five contracts contested here, Mr. Felts' 2002 and after purchases included a 10 Year Period Certain (July 2002 – $10,000 premium), two Life with 5 Years (July 2003 – $30,000 premium; June 2004 – $10,200 premium) and one Life Only (February 2004 – $15,000 premium). (*See*, Exh. J.) These annuities named the Estate's heirs as beneficiaries and, perhaps not surprisingly, the Estate does not contest these purchases.

[10]The technique of seniors converting equity from their residence's value into cash for living expenses and security, either through conventional "cash out" refinancing or reverse mortgages, is certainly not new or improper. However, such a transaction by itself creates a limited fund which one might outlive. If instead the loan proceeds are used to purchase a fixed, immediate annuities, a senior can create an inexhaustible income stream sufficient to service the mortgage debt and leave money left over for living expenses. This strategy would be

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To demonstrate Stern's supposed knowledge, the Estate points to the annuity purchase application Mr. Felts signed out on October 12, 2002 for annuity no. 386493. Specifically, that form contains a space for the applicant to identify its source of funds for the proposed purchase, presumably for Genworth to determine whether the purchase money was qualified or non-qualified and apply the appropriate tax treatment. (Supp. Stern Decl. No. 3; Supp. Exh. R.) Mr. Felts inserted the words "Savings - or Bank loan" here, giving rise to plaintiff's contention that Stern knew of the loan. However, a careful review of the document shows that Stern's signature was made on October 9, three days before Mr. Felts signed the application on October 12. (Supp. Stern Decl. No. 3; Supp. Exh. S.) At Mr. Felts' request, the application was pre-signed by Stern and mailed to Mr. Felts for completion. (*Id.*) Once the application was completed, Mr. Felts forwarded the application directly to Genworth. (*Id.*) Stern remained unaware of the loan until after Mr. Felts' death. (*Id.*)

Despite the artful, overreaching rhetoric of the Complaint, the gist of the claim is that Mr. Felts was sold Life Only products without disclosure of life expectancy information and that these annuities were unsuitable for his financial condition and objectives. As discussed below, under the undisputed facts of this case, the Estate's claims have no merit and Stern is entitled to judgment as a matter of law.

3. Legal Discussion.

FRCP Rule 56 provides in the relevant part the following:

> (b) A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim. . . .
>
> (c) . . . The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
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> (d) Case Not Fully Adjudicated on the Motion.

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particularly appropriate for a senior who had already provided for his heirs to the extent he desired.

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> (1) Establishing Facts. If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

When evaluating the evidence under a summary judgment motion to determine whether a genuine question of fact exists, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 254 (1986). For instance, when confronted with a claim or defense requiring proof by clear and convincing evidence,

> the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Id at 255-256.

A. Mr. Felts Was Not The Victim Of A Constructive Fraud.

Although nominally captioned "Restitution and Unjust Enrichment – Rescission", the Estate's first claim appears to be grounded in constructive fraud. For instance, the Estate alleges at paragraph 4.4 of the Complaint that, in light of defendants alleged superior knowledge of annuities and Mr. Felts' health conditions, the benefits paid under the annuities at issue were "so inadequate as to be constructively fraudulent when compared to the amount of premium payment made . . ." and in paragraph 4.6 that the grounds for the requested relief is "defendant's constructively fraudulent conduct . . . .."

"[C]ourts will not ordinarily undertake to weigh the consideration, for in the absence of undue influence or such gross inequality as to constitute a constructive fraud, the value or worth of the consideration should be left to the contracting parties." *Huberdeau v. Desmarais*, 79 Wn.2d 432, 440 (1971) Constructive fraud has been defined "as failure to perform an obligation, not by an honest mistake, but by some "interested or sinister motive." *Green v. McAllister*, 103 Wn. App. 452, 468 (2000)(*Citations omitted*).

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Here, Mr. Felts paid a specified premium ($141,420 with respect to the Stern annuities) for the promise of the insurer to make specified payments until his death, a date which at the time of contracting no living person knew with any degree of certainty. Both parties to some extent were exposed to monetary loss due to the contingent term of the contract and both parties stood to gain. Genworth did in fact make all promised payments to Mr. Felts during his life and until his death, with Mr. Felts receiving some $66,839.07 in premium benefit. Moreover, in life Mr. Felts had the security of knowing he would never outlive the resources which he devoted to the premium. It cannot be said that this consideration was so grossly inadequate as to render the contracts constructively fraudulent. Stern is entitled to judgment as a matter of law on this first claim for relief.

B. Mr. Felts Was Not Mistaken Regarding Any Fact Material To The Transactions.

Plaintiff alleges in its second claim that Mr. Felts "held a basic assumption that . . . he would *likely* live long enough to receive at least full repayment of his premium through regular periodic payments" of monthly benefits and that his belief was mistaken, as any reasonable person would have concluded. (Para. 5.2.)(*Emphasis added.*)

The rule for recovery for a unilateral mistake of fact was succinctly stated in *Snap-on Tools Corp. v. Roberts*, 35 Wn. App. 32, 34-35 (1983), where the Court explained:

> . . . a unilateral mistake of fact may be grounds for relief if the other party knows or is charged with knowing the mistake. . . . [citations omitted] No party may retain money claiming ignorance of facts which are reasonably ascertainable and would alert that party to the mistake."

Where there is no mistake of *fact* but instead only failed expectations, no relief will be granted. *Super Valu Stores v. Loveless*, 5 Wn. App. 551 (1971). As stated in *Lambert v. State Farm Mut. Auto*., 2 Wn. App. 136, 140 -141 (1970),

> The mistake must relate to a past or present fact, material to the contract and not to an opinion regarding future conditions as a result of present facts. The mere fact that a bad bargain is made will not entitle the releasor to avoid his contract. See the Restatement, Restitution § 11.
>
> Prognosis is not a fact. It is not capable of being determined with certainty. . . .

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The mistake claimed here is not one of fact at all. Instead, the alleged mistake – Mr. Felts' alleged belief that he would live sufficiently long to recover his premium – is more akin to an opinion or prognosis rather than a fact which under ordinary circumstances can be determined with any degree of certainty absent divine intervention. In fact, the Estate seems to admit this in the Complaint, characterizing the mistaken belief as "that he would *likely* live long enough" to recover his premium, implicitly conceding the understanding that he might not do so. *(Emphasis added.)* Because the alleged mistake was in actuality a failed expectation of future events, the Estate cannot satisfy even the first inquiry necessary to establish a claim for mistake of fact.

Even if Mr. Felts were mistaken about some actual existing fact, the Estate still cannot prevail on this claim. First, there is no evidence that Stern was actually aware of the mistake at the time of contracting or that he would somehow be charged with such knowledge. Further, the evidence is clear that when these annuities were purchased, Mr. Felts understood his mortality and the fact that his estate stood to lose the premium dollars spent on the annuities should he not live long enough to recover those amounts in premium. Mr. Felts was not mistaken about any fact which was material to these transactions and as such, Stern is entitled to summary judgment on the Estate's second claim for relief.

C. Stern Breached No Duty Of Care To Mr. Felts.

The third claim for relief for negligence asserts the following:

> Each defendant had a duty . . . to properly advise Robert S. Felts that . . . the SPIA products at issue were not suitable for him. Each knew or should have known that Mr. Felts intended to use borrowed funds to purchase [SPIAs] and knew or should have known about his state of health and had a duty to advise him that he was unlikely to receive his money back.

(Comp., ¶ 6.2.) Under the undisputed facts of this case, no such duty existed.

i. The Authorities Relied On By Plaintiff To Establish A Standard Of Care Do Not Apply To The Transactions At Issue.

In *Christensen v. Royal Sch. Dist.*, 156 Wn.2d 62 (2005), the Court expressed the following with respect to the question of duty under a negligence claim:

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> A showing of negligence requires proof of the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate cause. (*Citations omitted.*) The existence of a legal duty is a *question of law* and "depends on mixed considerations of "logic, common sense, justice, policy, and precedent."" (*Citations omitted.*)

Id at pp. 66-67 (Emphasis added.) As a question of law, the issue of duty is properly before the Court in the context of summary judgment.

In an attempt to establish some industry standard requiring that a suitability analysis be conducted for the sale of each of the contested SPIAs, the Estate relies of the testimony of proffered expert witness Vincent Micciche. Mr. Micciche testified that he holds the opinion that such an analysis was indeed required for each SPIA sale and that the sole objective authority for that opinion is the Senior Protection in Annuity Transactions Model Regulation (the "Model Regulation"), a proposal promulgated by the National Association of Insurance Commissioners. For a myriad of reasons, the Model Regulation does not apply to these transactions and thus establishes no duty.

Of first concern is the operative date of the Model Regulation. The Model Regulation was adopted by the NAIC on July 21, 2003, a point at which it became available for adoption by the states on an individualized basis. (Shearer Decl. 2, Exh. A thereto.) However, the purchases contested by the Estate were made from August 2001 to June 2003, before the Model Regulation had even been endorsed by the NAIC. The Model Regulation cannot provide a standard of care applicable to transactions consummated prior to adoption by its sponsoring agency or enactment by a single state.

To date Washington still has not adopted the Model Regulation. Instead, Washington relies on a disclosure-based Annuity and Deposit Fund Disclosure Regulation (the "Disclosure Regulation") to insure that consumers possess the necessary information to make informed decisions about the annuity products they seek to purchase. WAC 284-23-300, et seq. Importantly, immediate annuities like those contested in this case are specifically exempted from the Disclosure Regulation's requirements. WAC 284-23-320(3)(b). Thus, the Model Regulation

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provides no evidence of a standard of care existing in Washington or anywhere else at the time of these transactions. To the contrary, the fact that Washington has not adopted the Model Regulation over five years after its adoption is evidence that its provisions do not establish any standard of care in Washington.

Even if the Model Regulation had been adopted by Washington, its use to establish a standard of care is in direct conflict with Section 1(B) of the Model Regulation, which provides that:

> Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation.

Under the terms of the Model Regulation itself, the Estate's attempt to use it to establish a standard for private, civil liability is misplaced.

ii. Stern's Conduct In Consistent With The Model Regulation Requirements.

An examination of Stern's conduct shows that he did not deviate outside of the parameters established by the Model Regulation. Specifically, the Model Regulation applies only to *recommended* annuity purchases, Specifically expempting sales which do not flow from a recommendation by the producing agent. (Model Reg., §§ 2 and 4(A).) Likewise, there is no duty to conduct a suitability review under the Model Act where the customer refuses to provide complete and/or accurate information relevant to the determination of suitability. Here, the undisputed facts show that Stern made no recommendations to Mr. Felts regarding any of the annuities at issue and that Mr. Felts refused to discuss his financial circumstances with Stern. In fact, the evidence shows that Mr. Felts was not prone to taking advice at all, choosing instead to rely on his own knowledge and experience accumulated through years as an industry insider as well as an annuity purchaser. Even under the standard advanced by the Estate, Stern acted with due care.[11]

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[11]Given Mr. Felts' repeated statements that he had provided for his heirs to the extent he wished, the repeated demonstrations of his understanding of the non-refund nature of the Life Only annuities at issue, his sufficient income level to handle most financial emergencies and his

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D. Stern Is Not Liable For Negligent Or Intentional Misrepresentation.

The Estate's fourth claim for relief is for "Negligent or Intentional Misrepresentation" and is based on allegations that defendants failed to disclose 1) "the existing statistical life expectancy of a person the same age" as Mr. Felts, 2) "that accepting borrowed money as premiums on annuity contracts violates insurance industry standards," and 3) "it is against industry standards to sell SPIA contracts to consumers over ninety (90) years of age." (Comp., ¶ 7.3.) As set forth below, this claim too must fail.

i. Stern Owed No Duty To Disclose The Matters Alleged.

With respect to negligent misrepresentation, the Washington Supreme Court recently stated the following:

> A plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. [*Citations omitted*.] An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation. [*Citations omitted*.] Moreover, the plaintiff must not have been negligent in relying on the representation. [*Citations omitted*.]

Ross v. Kirner, 162 Wn.2d 493, 499-500 (2007).

The Court in *Stiley v. Block*, 130 Wn.2d 486, 505 (1996) stated the requirements for a claim of intentional misrepresentation:

> Each element of fraud must be established by "clear, cogent and convincing evidence." [*Citations omitted*.] The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

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professed desire to maximize income, Mr. Felts was in fact a suitable purchaser for these Life Only SPIAs.

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For both negligent and fraudulent misrepresentation claims, only where there is a duty to speak will the failure to do so become actionable. *Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 732 (1993). Such a duty may be found where there is some sort of special relationship of trust and confidence exists between the parties. *Id*. Ordinarily, absent such special circumstances, no duty to disclose exists where "the parties are dealing at arm's length." *Id* at 731-732.

While the relationship between Mr. Felts and Stern did in fact exist for approximately a decade, it certainly was not such that it rose to the level of a special relationship under the law. Stern never supplied advice to guide Mr. Felts in his business transactions (thus failing the first element of negligent misrepresentation) and Felts never asked for any. While Stern certainly respected Mr. Felts' intelligence, honesty and integrity and hopes that Mr. Felts felt reciprocally, the relationship between Stern and Felts was no more than that existing between parties to an arm's length transaction. Because the Estate cannot point to any facts which would indicate that Mr. Felts' sought out Stern's advice in a relationship of trust and confidence, Stern had no duty to disclose the matters alleged and cannot be liable for negligent or intentional misrepresentation as a matter of law.

ii. Stern Disclosed The Life Expectancy Data And Did Not Cause Felts Any Damage.

In any event, Stern did disclose the life expectancy data alleged through the publication of his Annuity Shopper periodical, which was sent to every Stern customer, including Mr. Felts, upon release. Further, as Ms. Charles testified, Mr. Felts would have known where to obtain such data had he desired it whether Stern had provided it or not. (Charles Depo., p.137, ll.2-15.)

As for the alleged concealment regarding the use of borrowed funds, Stern had no idea that Mr. Felts may have used borrowed funds to purchase the annuities in question until after Mr. Felts' death and had no duty to take affirmative efforts to learn of the loan. Even if some standard existed precluding the use of borrowed money to purchase fixed immediate annuities (a

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claim which Stern will dispute at trial), Stern could not disclose what he did not know. Mr. Felts suffered no damage from any act or omission by Stern.

Because there can be no misrepresentation by omission claim where, as here, there exists no affirmative duty to speak, because Stern disclosed life expectancy tables and because the evidence shows that Mr. Felts did not rely on any alleged omission to his damage, Stern is entitled to summary judgment on the fourth claim for relief.

E. Incorporation By Reference.

Stern specifically incorporates the arguments in Genworth's concurrently filed brief regarding causation, allocation of risk, the economic loss rule, statue of limitations, consumer protection act violations, Statutory violations (insurance regulations) and criminal profiteering by reference.

F. There Are No Grounds Upon Which To Base Any Injunctive Relief.

There was no deception or harm caused to Mr. Felts and thus no grounds for the eighth claim for injunctive relief. Further, Mr. Felts' demise, coupled with the Court's order denying class certification, calls into question the Estate's standing to even seek injunctive relief. There are no grounds to rescind the contracts relief and any declaratory judgment should provide that the Estate has no rights against Stern arising out of the alleged transactions. Judgment should enter on the eighth claim for relief as a matter of law.

4. <u>Conclusion</u>.

As set forth above, the material facts of this case are not in serious dispute and Stern is entitled to judgment as a matter of law on each of the Estate's claims for relief. Accordingly,

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Stern asks that this motion for summary judgment, or alternatively summary adjudication of individual claims, be granted.

Respectfully submitted on this 15th day of August, 2008

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By: */s/ Patrick L. Hinton*
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CERTIFICATE OF SERVICE

I, Patrick L. Hinton, hereby certify that on August 15, 2008, I electronically filed the document to which this certificate is attached with the Clerk of Court using the CM/ECF system. The Court or the CM/ECF system will send notification of such filing to the following electronically, with such notice constituting service of such documents:

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